

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
NORTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff/Respondent,

Case No. 10-cr-20563

v.

Honorable Thomas L. Ludington  
Magistrate Judge Patricia T. Morris

RICHARD ALAN BEHNAN,

Defendant/Petitioner.

---

**ORDER ADOPTING REPORT AND RECOMMENDATION, DENYING  
DEFENDANT'S MOTION TO VACATE, DENYING A CERTIFICATE OF  
APPEALABILITY, AND DENYING LEAVE TO PROCEED *IN FORMA PAUPERIS* ON  
APPEAL**

On May 6, 2015, Defendant/Petitioner Richard Behnan filed a *pro se* motion to vacate his sentence under 28 U.S.C. § 2255. *See* Def.'s Mot. Vacate, ECF No. 91. He alleged that counsel during his criminal proceeding was constitutionally ineffective. According to Behnan, his counsel was ineffective largely because Behnan rejected an initial plea offer that turned out to be more favorable than the second plea offer, which he accepted.<sup>1</sup> He also argued that his counsel was ineffective because his attorney committed certain ethical violations resulting in being disbarred in Michigan.<sup>2</sup>

On July 27, 2015, Magistrate Judge Patricia T. Morris issued a report recommending that Defendant's motion be denied because he did not meet the standards for demonstrating ineffective assistance of counsel as articulated in *Strickland v. Washington*, 466 U.S. 668 (1984).

---

<sup>1</sup> Behnan does not directly allege that his attorney counselled him to reject the first plea offer, but the argument is implied.

<sup>2</sup> His attorney was also eventually jailed on related charges.

*See* Rep. & Rec. 6-10, ECF No. 101. Judge Morris also found that ethical violations by Behnan's attorney, without more, do not *per se* constitute ineffective assistance of counsel. *Id.* 10-11.

Although the Magistrate Judge's report explicitly stated that the parties to this action may object to and seek review of the recommendation within fourteen days of service of the report, neither Plaintiff nor Defendant filed any objections. The election not to file objections to the Magistrate Judge's report releases the Court from its duty to independently review the record. *Thomas v. Arn*, 474 U.S. 140, 149 (1985). The failure to file objections to the report and recommendation waives any further right to appeal.

Before Behnan may appeal this Court's dispositive decision<sup>3</sup>, a certificate of appealability must issue. *See* 28 U.S.C. § 2253(c)(1)(B); FED. R. APP. P. 22(b). A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a court rejects a habeas claim on the merits, the substantial showing threshold is met if the petitioner demonstrates that reasonable jurists would find the district court's assessment of the constitutional claim debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484–85 (2000). "A petitioner satisfies this standard by demonstrating that . . . jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). In applying that standard, a district court may not conduct a full merits review, but must limit its examination to a threshold inquiry into the underlying merit of the petitioner's claims. *Id.* at 336–37. "The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rules Governing § 2255 Proceedings, Rule 11, 28 U.S.C.A. foll. § 2255.

---

<sup>3</sup> Behnan's lack of objections to Judge Morris' Report waives his right to appeal as a precedent matter.

Having considered the matter, the Court concludes that Behnan cannot make a substantial showing of the denial of a constitutional right. A certificate of appealability is not warranted in this case. The Court will also deny Behnan permission to proceed on appeal *in forma pauperis*. See *Foster v. Ludwick*, 208 F. Supp. 2d 750, 764 (E.D. Mich. 2002); 28 U.S.C. § 1915(a)(3); FED. R. APP. P. 24 (a).

Accordingly, it is **ORDERED** that the magistrate judge's report and recommendation, ECF No. 101, is **ADOPTED**.

It is further **ORDERED** that Defendant's Motion to Vacate, ECF No. 91, is **DENIED**.

It is further **ORDERED** that a certificate of appealability is **DENIED**.

It is further **ORDERED** that permission to proceed *in forma pauperis* on appeal is **DENIED**.

s/Thomas L. Ludington  
THOMAS L. LUDINGTON  
United States District Judge

Dated: October 5, 2015

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing order was served upon each attorney or party of record herein by electronic means or first class U.S. mail on October 5, 2015.

s/Michael A. Sian  
MICHAEL A. SIAN, Case Manager